In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 444

HUGH C. FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner brought this action under the Federal Tort Claims Act (28 U.S.C. 1346(b), 2671 *et seq.*), on August 15, 1963, alleging that negligent maintenance of the steps of the United States Post Office in Marlin, Texas, had caused him to slip and fall, with resulting bodily injury. He amended his complaint as a matter of course on August 22, 1963, repeating the same factual allegations, but stating that because of his injuries he would be permanently unable to transact his business. The United States

filed a timely answer on October 15, 1963, alleging contributory negligence, and also that it was without knowledge as to the allegations in the complaint (aside from jurisdiction) and hence denied them. On February 17, 1964, petitioner moved for judgment on the pleadings, or, in the alternative, to strike the government's answer. Prior to trial, the United States, on February 26, 1964, having completed its own investigation into the facts of the case, filed a motion for leave to amend the answer. The court, determining "that justice requires such leave be given", granted the request. The amended answer specifically denied negligence on the part of the United States. Petitioner then moved the court to vacate its order allowing the amended answer, and to dismiss the amended answer. On April 20, 1964, the court denied all of petitioner's pending motions.

At trial, petitioner introduced no evidence bearing on liability. After he rested, the United States moved for dismissal on the pleadings and on petitioner's failure to make out a *prima facie* case. This motion was granted, and an order was entered dismissing the action. Petitioner's appeal to the Fifth Circuit was dismissed *per curiam*, 359 F. 2d 59. That disposition, we submit, was clearly appropriate.

2. As we understand the petition, it raises three main issues: (1) that the district court had no authority to grant the United States leave to amend its answer and the original answer thereby left standing was legally insufficient, so that the allegations in plaintiff's complaint (except with respect to damages) must be taken as true; (2) that the district court

did not file separate findings of fact and conclusions of law as required by the Federal Rules of Civil Procedure; (3) that the Court of Appeals deprived petitioner of due process by disposing of the case in a brief *per curiam* decision which did not discuss the contentions raised in petitioner's brief.

a. The district court clearly had authority under the Federal Rules to permit the United States to file an amended answer.[1] Rule 15(a) expressly provides that when leave of court to amend is sought "* * * leave shall be freely given when justice so requires," and that amendments are to be liberally allowed. See, *e.g.*, *Foman* v. *Davis*, 371 U.S. 178; *Huse* v. *Consolidated Freightways*, 227 F. 2d 425 (C.A. 7); *Lone Star Motor Import, Inc.* v. *Citroen Cars Corporation*, 288 F. 2d 69 (C.A. 5).[2]

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[1] Petitioner now argues that the amended answer was never filed (Pet. 27). However, the amended answer was filed in the district court (R. 13) pursuant to the order of that court, and the docket entries reflect that it was filed on March 2, 1964.

[2] Since the motion to amend was properly granted, it is not necessary to consider petitioner's argument that the effect of the United States' original answer was to admit liability on the part of the government. However, Rule 8(b) clearly provides that the statement that a defendant is "without knowledge or information sufficient to form a belief * * * has the effect of a denial." There is nothing improper in the government's answering in such a manner when it has not yet completed an investigation of the circumstances of the complaint.

Similarly, since the motion to amend was properly granted, petitioner's argument that the United States' original answer was irresponsive (and therefore insufficient) since allegedly directed against petitioner's original complaint, and not his amended complaint, is without merit. As noted *supra*, peti-

b. Petitioner's contention that the court failed to make separate findings of fact and conclusions of law pursuant to Rules 41(b) and 52(a) is without foundation. In its order dismissing the action, the district court ruled that plaintiff had failed to make out a *prima facie* case and concluded that the action should be dismissed (R. 22). Since petitioner introduced no evidence at all on the issue of liability, the action was not one "tried upon the facts." Rule 52(a). The district court's order adequately reflected the basis of its decision, and the making of formal findings and conclusions was neither feasible nor necessary.

c. Finally, there is no basis for petitioner's contention that he was deprived of due process by the manner in which the Fifth Circuit disposed of his appeal. An appellate court need not mention specifically in its opinion every contention raised by a party.

We respectfully submit that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

SEPTEMBER 1966

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tioner's amended complaint repeated the same factual allegations which were stated in his original complaint. A denial for want of knowledge in an answer timely filed by the United States, however directed, is plainly sufficient and does not result in an admission of such allegations.

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